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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 173

MURRAY MESTER AND MEYER MESTER,
Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

PHILIP J. HENNESSEY,
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UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Civil Action No. 7106

MURRAY MESTER AND MEYER MESTER,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ARDE BULOVA, HARRY D. HENSHEL, AND RICHARD E. O'DEA,
Defendants

REPLY BRIEF TO APPELLEES' MOTION TO AFFIRM

I

Appellees misconceive the basis of this appeal. The primary question tendered is the interpretation of the term, "character" as used in Sec. 308(b) of the Communications Act of 1934 in connection with the licensing powers of the Federal Communications Commission. The District Court concluded that in the absence of a legislative definition of this term "a person's character is usually thought to embrace all his qualities and deficiencies regarding traits of personality, behavior, integrity, temperament, consideration, sportsmanship, altruism, etc., which distinguish him as a human being from his fellow men." This definition of character comprehends the entire sphere of human conduct in relationship to good and evil, the obligation of duty and the principles of ethics; there is no human frailty or

weakness which is not covered by this definition. Congress never intended the Commission to apply so stringent a standard of fitness which bears no reasonable relationship to "bad character." The test for character heretofore employed has been "the commission of crime—the violation of the penal laws of a state. . . ." *Hawker* v. *People of New York*, 170 U. S. 189 (1898). Thus the Federal Alcohol Administration Act (Act of August 29, 1935, 49 Stat. 978, Act of June 30, 1940, 54 Stat. 1232, 27 U. S. C. A. Sec. 204(a)) specifies criminal misconduct as a statutory ground for denying a basic permit; and in the immigration and deportation of aliens (Act of Feb. 5, 1920, c. 29, 39 Stat. 875; Act of June 5, 1920, c. 243, 41 Stat. 981, 8 U. S. C. A., Sec. 136(e), and 155(a)) civil litigation is no ground for denying admission to or deporting aliens. See *United States ex rel. Mylius* v. *Uhl*, 2nd Cir. 1914, 210 Fed. 860 and *United States* v. *Carrollo* (D. C. W. D. Mo. 1939), 30 F. Supp. 3, 7. The State legislatures and courts apply a similar standard. *Gandy* v. *State*, 10 Neb. 243, 4 N. W. 1019 (1880); *Lovely* v. *Cockrell*, 237 Ky. 547, 35 S. W. (2nd) 891 (1931); *In Re Alameda County Bar Ass'n*, 35 Cal. App. 534, 170 Pac. 432 (1917); *In Re Conley*, 188 Minn. 575, 248 N. W. 41 (1933).

Assuming arguendo, that certain types of civil actions have a reasonable relationship to bad character, viz., fraud, monopoly, fraudulent convenance, etc., appellants' civil litigation bears no relevancy to any objective or subjective test of bad character. Appellants' civil litigation consisted of: (a) *in rem* actions; (b) stipulations; and (c) settlements out of court. By any objective standard, such civil litigation does not constitute evidence of bad character. Tested by a subjective standard, there is not one iota of evidence in this record to support the conclusion that appellants' activities with other Federal and State agencies was

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willful or deliberate. None of the agencies with which appellants were involved made any finding or conclusion as to appellants' intent. The Commission's conclusion that "many of the violations were not inadvertent" does not specify which matters of civil litigation were willful or deliberate. And the appellees' motion to affirm does not answer this contention for the obvious reason that the record is totally silent on this issue.

What the Commission did in this case was to retry the matters in which appellants had been involved with other agencies and arrive at conclusions which have no basis either in fact or law.

II

The administrative conclusion that the transferees' lack of candor in testifying under cross-examination on a matter not covered by the application forms manifested a "willingness to deceive" (Appellees' Brief p. 5) is erroneous and is not reflected in the Commission's final decision. In its proposed decision the Commission alleged that the transferees misrepresented and concealed the facts concerning their civil litigation with regulatory bodies. After argument, the Commission withdrew these findings.

This is not the only misstatement of fact set forth in the Commission's decision and appellees' motion to affirm.

The decision recites that "the transferees revealed an extreme lack of candor in testifying under oath as to their numerous difficulties with various governmental bodies." But with reference to Meyer Mester there is no evidence to support this conclusion. Meyer Mester did not testify on direct examination, nor was he cross-examined upon "their numerous difficulties with various governmental bodies."

Appellees in their motion at page 5 assert that the conclusions as to candor and reliability based on Murray Mester's testimony bind Meyer Mester since "these con-

clusions are made as to the proposed transferees as a partnership." But the record is unequivocal that appellants "took (equal interest in the stock) individually and personally and not as a partnership" (Tr. 265).

These erroneous conclusions of fact and law reflect a lack of attentive consideration to the evidence introduced at the hearing. *Saginaw Broadcasting Co.* v. *FCC*, 68 App. D. C. 282, 96 F. (2d) 554 (1938); *Securities Commission* v. *Chenery Corp.*, 318 U. S. 80 (1943). These erroneous factual allegations have a deeper vice. The conclusions obtained from the foregoing factual errors have distorted the record to the prejudice of appellants and thus denied them a fair hearing within the meaning of the Constitution.

III

Appellees misconceive the seventh assignment of error which recites that the Commission's action violated the Fifth Amendment since the test of qualifications based on civil litigation has not been applied uniformly with reference to other licensees and transferees approved by the Commission both *prior* to and *subsequent* to the hearing in this case. In *FCC* v. *WOKO, Inc.*, 329 U. S. 223 (1946) the Supreme Court held that the Commission was not bound by its previous decisions or policies in its adjudicatory functions. But the question of law tendered by this assignment of error is whether the Commission can single out the appellants and apply an exclusive standard of fitness which is not made applicable to other transferees and applicants. Prior to this decision the Commission granted applications to persons convicted of a felony. *In Re Thomas*, 5 FCC 84 (1938), 7 FCC 108 (1939); contemporaneously with this decision, it approved a transfer to a corporation involved in civil litigation with the Food and Drug Administration and other Federal agencies. *In Re application of Scripps-*

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Howard Radio, Inc., transferor and Plough, Inc., transferee for Transfer of Control of WMPS, Inc., licensee of Station WMPS, Memphis, Tennessee (FCC File No. B3-TC-411); subsequent to this decision applications for broadcast licenses have been granted to persons violating the liquor and gambling laws of a State, State lottery laws and the statute and regulations of the OPA (*Re Jones, et al.* (B-273, decided April 9, 1947), — FCC —;) *Re Abilene Broadcasting Company, et al.* (B-345, Proposed Decision, decided March 31, 1947); *Re Air Waves, Inc., et al.* (B-227, decided March 20, 1946), — FCC —.)

This is the *only* case since the inception of Federal regulatory control over communications wherein the Commission has denied an application because of appellants' record of civil litigation. The application of this standard only to the appellants but not to previous and subsequent transferees and applicants constitutes an arbitrary and unequal application of the law contrary to the Fifth Amendment.

But the deeper vice is the prejudicial action reflected by this action. "The Commission cannot announce the applicability of a formula and then distort its application by failure to find accurately the factors required by the formula, or by departing from the essential progress of the formula from premise to conclusion. When the Commission announced principles or formulae as applicable, the validity of its order can be determined only by measuring what it does against the principles it announces. This is so not only upon the authority of *Securities Comm'n* v. *Chenery Corp.* (318 U. S. 80 (1943)), but because any other course would permit an administrative agency to announce a proper principle and under that protection, achieve an improper result by unrevealed considerations wholly apart from the announcement." *Mississippi River Fuel Co.* v.

The Federal Power Commission, U. S. Ct. of Appeals, D. C., No. 9181, decided May 28, 1947.

IV

This case also tenders an important issue under the First Amendment. The Commission's action in this case has denied appellants access to an important medium of communications because of their purported character. Freedom of speech means that the avenues of communication are open to all for the expression of their views. The test of character as it was employed by the Commission and affirmed by the District Court constitutes an unconstitutional restriction on the right to engage in interstate communications. *Abrams* v. *United States*, 250 U. S. 616, 630 (1919); *Hannegan* v. *Esquire*, 327 U. S. 146 (1946).

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